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No.

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In the Supreme Court of the United States

October Term, 1987

WILLIAM COPLEY, *et al.*,
Petitioners,

vs.

HEIL-QUAKER CORP., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Does Section 23 of the Consumer Product Safety Act, 15 U.S.C. Section 2072, provide a private right of action for a willful violation of the substantial hazard reporting regulations issued by the Consumer Product Safety Commission at 16 C.F.R. Part 1115?

2. Is a manufacturer summarily entitled to the benefits of the statute of limitations where:

(a) it is admitted that the manufacturer had specific knowledge that a self-concealing defect in a product created a substantial product hazard;

(b) it is admitted that the manufacturer ignored its affirmative duty to report the defect to the CPSC;

(c) it is admitted that the manufacturer engaged in fraudulent acts over a 15-year period designed to conceal the defect from the CPSC, litigants, the public and others;

(d) the litigants seriously injured by the self-concealing defect offer credible evidence that the manufacturer's fraudulent conduct frustrated their efforts to ascertain whether the injuries sustained were the result of actionable conduct?

PARTIES

Present Petitioners are: William Copley, Patsy Copley, his wife, and Dale Copley, their son. All were parties in all actions below.

Present Respondents are Heil-Quaker Corporation, Honeywell, Inc., Sears, Roebuck & Company, Frey & Sons and Phillips Bottled Gas Company.

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OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Sixth Circuit is *William Copley, et al. v. Heil-Quaker Corp., et al.*, Case No. 86-3360 (6th Cir. May 20, 1987). It is found in the appendix to this case.

The opinion of the Federal District Court for the Northern District of Ohio is also unpublished. It is *William Copley, et al. v. Heil-Quaker Corp., et al.*, Case No. C82-512 (N.D. Oh. March 25, 1986). That opinion will also be found in the appendix to this case.

JURISDICTION

Petitioner invokes the jurisdiction of this Court to review the decision of the Court of Appeals for the Sixth Circuit under 28 U.S.C. Section 1254(1) **and Supreme Court Rule 17.1(a)**. Jurisdiction of the Federal District Court was invoked because of diversity of citizenship and under 15 U.S.C. Section 2072 which allows suits in any District Court of the United States.

STATUTES AND RULES INVOLVED

The Consumer Product Safety Act (CPSA), at 15 U.S.C. Section 2072 specifies, in relevant part:

> "(a) Any person who shall sustain injury by reason of any knowing (including willful) violation of a Consumer Product Safety Rule, or *any other rule or order issued by the Commission*, may sue any person who knowingly (including willfully) violated any such rule or order in any district court of the United States.
>
> • • • • •
>
> (c) The remedies provided for in this section shall be *in addition to and not in lieu of* any other remedies provided by common law or under federal or state law." 15 U.S.C. Section 2072 (1982) (emphasis added)

The 1974 text of the Code of Federal Regulations provides, in relevant part:

> 1115.2 Purpose.
>
> The purpose of this Part 1115 is to enable the Commission to evaluate notifications to determine if a

reported product which could create a substantial product hazard does, in the Commission's opinion, create a substantial product hazard and to determine the adequacy of a substantial product hazard notification.

1115.4 General Requirements.

Every manufacturer of a consumer product distributed in commerce . . . shall immediately inform the Director, Bureau of Compliance, Consumer Product Safety Commission, Washington, D.C. . . . of any defect or failure to comply immediately upon obtaining information . . . which reasonably supports the conclusion that a product contains a defect which creates or could create a substantial product hazard.

1115.5 Initial notification.

The initial notification to the Commission shall:

• • • • •

(e) Furnish (to the extent such information is then reasonably available) the data specified in section 1115.7(a).

• • • • •

1115.7 Subsequent notification.

(a) Subsequent notification to the Commission shall be made in writing and shall include, but not be limited to, the information listed below in this paragraph (a). The person(s) responsible for supplying such information is (are) placed in parentheses after each item information requested. For the purposes of this Part 1115 and in accordance with the Act, "manufacturer" includes any importer of consumer products.

• • • • •

(3) Nature of the potential hazard (manufacturer, distributor, retailer).

(4) *Date upon which information was obtained which reasonably supported the conclusion that a potential product hazard existed* (manufacturer, distributor, retailer).

(5) *Manner in which information was obtained* supporting the existence of a potential product hazard, *such as consumer complaint,* quality control testing, etc. If consumer complaints are involved, copies of such complaints should be forwarded to the Commission. (Manufacturer, distributor, retailer).

(6) Nature of the potential injury associated with the potential product hazard (manufacturer, distributor, retailer).

(7) *Whether injuries have occurred associated with the hazard or potential product hazard.* Include the number, nature, and severity of such injuries. (Manufacturer, distributor, retailer, to the extent known to each)."[1] Substantial Product Hazard Notifications, 39 Fed. Reg. 6061 (1974) (to be codified at 16 C.F.R. Section 1115)

The Consumer Product Safety Act defines "substantial product hazards" in the following manner.

Section 2064. Substantial product hazards

(a) For purposes of this section, the term "substantial product hazard" means—

---

1. These relevant portions were cited, and emphasis added, by the Federal District Court for the District of Maryland, in *Butcher v. Robertshaw Constrols Co.,* 550 F. Supp. 692 at 697-98 (D. Md. 1981). The determination of relevance of the portions of the C.F.R. cited was made by the court not by Petitioners. The only exception to this is that Petitioners have also included Section 1115.2 in its entirety.

(1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or

(2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public. 15 U.S.C. Section 2064 (1982)

This Court has advanced the following consideration governing review on certiorari:

Rule 17

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) *When a federal court of appeals* has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or *has decided a federal question in a way in conflict with a state court of last resort;* or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. Sup. Ct. R. 17.1(a) (emphasis added)

STATEMENT OF FACTS

The facts are not in dispute. In 1975, William Copley[2] was severely injured when his residential furnace exploded.

Because of the initial burns themselves and some 50 skin grafts that were taken to repair the injured surfaces of his body, the only natural skin left on Bill's body is the skin on the bottom of his feet. More than four years convalescence followed the explosion. It was during this period and in these circumstances that the Copleys attempted to ascertain whether the explosion was the result of someone's fault.

Because of Bill's incapacitating injuries, Patsy undertook the effort to ascertain if the explosion was the result of any failure on the part of another person. In addition to other inquiries, Patsy sought the help of a local plumbing and heating contractor, William Bloom, for an explanation of the explosion.

The possibility of a mechanical failure of the furnace valve as well as other potential mechanical and non-mechanical failures were obvious areas of inquiry undertaken by William Bloom. William Bloom testified in great detail about extensive efforts he made and the fact that these efforts failed to produce any suggestion of fault on the part of Honeywell or any other person. William Bloom testified that:

---

2. For the sake of simplicity, plaintiff, William Copley, shall hereinafter be referred to as "Bill"; plaintiff, Patsy Copley, shall hereinafter be referred to as "Patsy"; and plaintiff, Dale Copley, shall hereinafter be referred to as "Dale". When referred to jointly, the plaintiffs will be referred to simply as "the Copleys" and/or as "Petitioners".

1. He ". . . did not ascertain what if anything it was about the valve that played a role in the gas leakage . . . ." and that he ". . . observed nothing about the valve that would have suggested what . . . caused the gas leakage" and that his "visual inspection did not suggest what if anything there was about the valve that would cause it to fail for a mechanical or design reason."

2. He had checked with numerous sources that he knew to be reliable to determine if the valve had failed because of a mechanical or a design reason.

3. In all his years in the plumbing business, he was not familiar with the type of mechanical problem unearthed by the Consumer Product Safety Commission in 1982 and, therefore, he ". . . never would have thought to examine the valve for that particular failure."

In 1982, as a result of the Consumer Product Safety Commission's (CPSC) actions, persons in the heating and plumbing trade, for the first time, were made aware of a specific problem with the valve that serviced the Copleys' furnace. In 1982, the CPSC sought and obtained an order requiring public notice of the defect and a recall of the defective valves. Because of the egregious nature of the concealment, the CPSC also sought and obtained the largest quasi-criminal penalty assessed since the inception of the CPSC.

The critical safety-related problem revealed by the CPSC's action is now commonly known as the "stick down" problem. A detailed description of this problem is obviated by the requirements of conciseness. What is significant is the fact that it is a problem that is very diffi-

cult to discover prior to or after an explosion. Discovering the fact that the cause of the Copley explosion was the "stick down" problem was particularly unlikely because Bill had turned the knob to the "off" position prior to the explosion. As explained by one of Petitioners' experts:

> "[T]he 'stick down' problem is a subtle and not readily ascertainable problem, particularly if the knob is not found in the stuck down position. If the knob was in the off position following the explosion, neither the knob nor the valve would give any indication of what had happened. Only a person or persons who already knew about the 'stick down' problem or a person with an unusual background regarding this particular valve or these type of gas appliances would be able to reconstruct what happened."

The 1982 CPSC action against Honeywell revealed a pervasive history of affirmative acts undertaken to conceal the "stick down" problem.

Conciseness permits only one example. In 1974, a federal court found Honeywell's responses to discovery evasive. The court issued a specific discovery order requiring Honeywell to search its records and advise the court if Honeywell had received any notices or had been named in any other lawsuits alleging a defect in the subject valves. In response to this federal court order, Honeywell responded that there were no such records. When the CPSC instituted its proceedings against Honeywell, it unearthed documents that revealed that: (1) there was an adjudication in 1970 culminating with a specific finding that the "stick down" problem caused an explosion; (2) numerous internal engineering documents not only identifying the specific problem but characterizing it as

"extremely hazardous"; and (3) copious records of other claims. The Copleys documented that Honeywell had engaged in this type of fraud on the judiciary and litigants for many years before and after the explosion in their home and before and after promulgation of 16 C.F.R. Section 1115.

Immediately upon discovery of the "stick down" problem and its connection with their injuries, the Copleys commenced their common law action as well as their claim to recovery under 15 U.S.C. Section 2072. The common law action was commenced nine (9) months after the expiration of the applicable statute of limitations. When confronted in the Copley litigation with copious documentation of its 15 years of concealment, Honeywell admitted *arguendo* that they had engaged in 15 years of concealment and had willfully violated their affirmative duty to disclose this information to the CPSC.

Jurisdiction for the common law action was based on diversity of citizenship. Section 23 CPSA, 15 U.S.C. Section 2072 specifically provides that the action may be brought ". . . in any district court of the United States . . . ."

The Copleys' complaint was summarily dismissed with the lower court finding that the CPSA does not create a private cause of action for willful nondisclosure of a known serious product hazard. The lower court further held that Honeywell's admitted fraud and concealment did not entitle the Copleys to submit to a jury their claim that the untimeliness of their suit was excused by Honeywell's admitted fraud and admitted willful non-compliance with 16 C.F.R. 1115.

REASONS FOR GRANTING THE WRIT

I. A writ should issue pursuant to Rule 17.1(a) Rules of the United States Supreme Court because a unanimous decision from the United States Court of Appeals, Eighth Circuit, is in clear conflict with a unanimous decision of the Supreme Court of Minnesota.

Introduction

A. Jurisdiction

Petitioners request that a writ be issued to the Sixth Circuit Court of Appeals because Rule 17.1(a) of the Rules of the Supreme Court of the United States specifically suggests review of a question "[w]hen a federal court of appeals . . . has decided a federal question in a way in conflict with a state court of last resort . . ."

B. Abbreviations

For brevity, the following abbreviations will be utilized in Petitioners' brief:

"Rule 17.1(a)" refers to Rule 17.1(a) Rules of the United States Supreme Court.

"Section 15(b)" refers to Section 15(b) of the Consumer Product Safety Act, 15 U.S.C. Section 2064 (b) (1982).

"Section 23(a)" refers to Section 23(a) of the Consumer Product Safety Act, 15 U.S.C. Section 2072 (a) (1982).

"16 C.F.R. Section 1115" refers to the Substantial Product Hazard Notification Regulations promulgated by the CPSC to become effective March 21, 1974.

"**Swenson**" refers to *Swenson v. Emerson Electric Company,* 374 N.W.2d 690 (Minn. 1985). This is the Minnesota Supreme Court decision that held that a violation of 16 C.F.R. Section 1115 creates a private cause of action.

"**Drake**" refers to *Drake v. Honeywell, Inc.,* 797 F.2d 603 (8th Cir. 1986). This is the Eighth Circuit United States Court of Appeals decision that held that a violation of 16 C.F.R. Section 1115 does not create a private cause of action.

The differences between the decisions of the Eighth Circuit in *Drake* and the Supreme Court of Minnesota in *Swenson* fully illustrate not only the conflict itself but the rationale that led each of the courts to their diametrically opposite conclusions. Before analyzing the two decisions, a brief chronology of the specific cases resulting in the Rule 17.1(a) conflict follows.

C. Chronology of the two cases which culminated in the conflict defined by Rule 17.1(a) Rules of the United States Supreme Court.

Swenson v. Emerson Electric Co., 374 N.W.2d 690 (Minn. 1985)

Decided September 20, 1985.

The Supreme Court of Minnesota finds that there is a private cause of action for violation of 16 C.F.R. Section 1115. As indicated, this decision is referred to simply as *Swenson.*

Emerson Electric Co. v. Swenson, 106 S. Ct. 1998 (1986)

Decided May 20, 1986.

This was a petition for a writ of certiorari filed by Emerson Electric Co. in response to the adverse decision in *Swenson*. The petition requested a writ be issued to the Supreme Court of Minnesota. The motion of the Chamber of Commerce of the United States and others for leave to file a brief as an *amicus curiae* was granted. The petition for a writ of certiorari was denied. **At the time of the denial of this petition, there was no conflict as defined in Rule 17.1(a).**

Drake v. Honeywell, Inc., 797 F.2d 603 (8th Cir. 1986)

Decided July 23, 1986.

The United States Court of Appeals, Eighth Circuit, holds that a violation of 16 C.F.R. 1115 does not create a private cause of action. **This decision created the initial Rule 17.1(a) conflict. The decision of the Sixth Circuit for which Petitioners seek this writ is yet another Rule 17.1(a) conflict on the identical question.** As indicated, this decision will be referred to simply as *Drake*.

II. The conflicting decisions of the Supreme Court of Minnesota in Swenson and the Eighth Circuit Court of Appeals in Drake define and illustrate the importance of the question presented.

Section 23(a) contains the words **"any other rule . . . issued by the Commission."** It is these words that are the source of the Rule 17.1(a) conflicting decisions as well as the other conflicting decisions briefed in Section IV of this Petition.

Swenson adopted the strict construction or plain-meaning approach in analyzing the significance of these words.

"Our first task in interpreting a statute is simply to examine the language of the statute and, '[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' (citations omitted) Section 2072 provides a private cause of action to any person injured by a 'violation of a consumer product safety rule, *or any other rule or order issued by the Commission.*' 15 U.S.C. Section 2072(a). The CPSA defines a 'consumer product safety rule' as a rule which establishes performance or labeling requirements for a product or which bans a product as hazardous. 15 U.S.C. Sections 2052(a)(2), 2056(a). *The CPSA does not define 'rule' as used in the phrase 'any other rule or order issued by the Commission.' We therefore construe the statute literally* and conclude that violation of '*any* other rule . . . issued by the Commission' gives rise to a private right of action under Section 2072. *Swenson* at 699. (emphasis added)

Drake rejected the plain-meaning approach adopted in *Swenson*, holding

"Our investigation, however, only starts with the statutory language. The question whether a statute permits a private right of action is ultimately one of congressional intent. *Drake* at 606.

The Eighth Circuit declined to adopt the rule of statutory construction enunciated by the United States Supreme Court in *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). In construing another provision of the CPSA, Justice Rehnquist, now Chief Justice, speaking for a unanimous court, stated:

"We begin with the familiar canon of statutory construction that the starting point for interpreting a

statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.* at 108.

Rejecting that proposition, the *Drake* court then reasoned that inasmuch as the statute itself created no private cause of action for failure to report substantiai product hazards, then Congress must not have intended to create a private cause of action for violation of a *rule* promulgated pursuant to the statute. Thus reasoning, the *Drake* court concluded that:

"... *despite the plain meaning of 'rule,'* failure to comply with the Commission's reporting rules does not give rise to a private cause of action." *Drake* at 606. (emphasis added)

The diametrically-opposed opinions in *Drake* and *Swenson* did not end with their differences in applying rules of statutory construction. Both courts drew different conclusions from the federal Administrative Procedure Act and different conclusions from the legislative history.

Using the Administrative Procedure Act as authority, *Swenson* concluded that:

"[A]n interpretive rule is included in the definition of 'rule' in the federal Administrative Procedure Act and that Section 2072 contains no indication that Congress meant to exclude interpretive rules from 'rule' as used in Section 2072." *Swenson* at 700.

In *Drake*, the Court also looked to the federal Administrative Procedure Act for guidance in interpreting the word *rule*. The *Drake* Court, in stark contrast to *Swenson*, opined:

"Our conclusion . . . is reinforced when the problem is viewed through the lens of well-settled principles of administrative law." *Drake* at 606.

"[A] claim of conduct inconsistent with an interpretive rule is advanced only to show that the statute itself has been violated. An action based on a violation of an interpretive rule does not state a legal claim. Being in nature hortatory rather than mandatory, interpretive rules never can be violated." *Drake* at 607.

On the significance of the legislative history of the CPSA, *Drake* and *Swenson,* again, came to different conclusions. *Swenson* held:

"The legislative history of the CPSA reflects no attempt to define 'rule' as used in Section 2072, and contains no discussion of the distinction between substantive and interpretive rules. (citations omitted) We therefore find no 'clearly expressed legislative intention' that contradicts the plain meaning of Section 2072.

Our conclusion is supported by a majority of the federal courts that have ruled on this issue." *Swenson* at 699.

In contrast, *Drake* noted that an earlier House bill and an earlier Senate bill that preceded the final enactment provided no private cause of action for violation of disclosure rules and the *Drake* court, therefore, concluded:

". . . the legislative history is void of any suggestion that Congress intended to provide a private remedy for noncompliance with Commission rules issued pursuant to the Section 15(b) reporting requirement. The legislative history of Section 23(a) *at best presents conflicting intentions.* We cannot on this basis conclude that Congress intended a private cause of action for

an injury resulting from noncompliance with the product hazard reporting rules issued by the Commission." *Drake* at 609.

That two courts (and now a third court, i.e. the Sixth Circuit in *Copley*) could unanimously come to diametrically-opposed decisions and also draw completely different reasoning from the Administrative Procedure Act and the relevant legislative history is a compelling argument for the issuance of the requested writ.

III. While arriving at wholly different conclusions, Drake and Swenson emphatically agreed that the question is substantial.

While Petitioners disagree with both the analysis and the conclusion enunciated in *Drake*, the decision forcefully and succinctly highlighted the significance of the question presented. The court concluded that:

> "*We do not* intend by our holding today to *minimize* either *the important goals sought by* the Act or the vital role played by *the statutory reporting requirements* in achieving them. **Compliance by manufacturers,** distributors, and retailers with Section 15(b) **obviously is critical to the fulfillment of the congressional purpose, to 'protect the public against unreasonable risks of injuries associated with consumer products.'** . . . [I]n a recent policy statement, *the Commission documents its belief that 'there is both a substantial amount of underreporting of the most serious hazards as well as undue delay in filing reports.'* 49 Fed. Reg. 13820, 13821 (1984). The Commission explains that **'[w]hatever the reasons for not reporting, the result is that the safety of the American public can be jeopardized to the extent that large number of persons using or possessing the same**

product remain unaware of the potential risk and are unable to benefit from corrective action that would have been sought by the Commission.' *Id.* at 13822." *Drake* at 611. (emphasis added)

On the importance of the issue for which the writ is requested, *Swenson* stated:

"**The purpose of establishing the CPSC was 'to protect the public against unreasonable risks of injury associated with consumer products'** . . . The CPSC was instructed to establish an Injury Information Clearinghouse for the collection and analysis of injury data . . . **If the CPSC determines that the product defect reported presents a substantial product hazard, it can** require a manufacturer, distributor, or retailer to **notify the general public of the defect.**" (citation omitted) *Swenson* at 703.

"The **disclosure requirements** imposed by the CPSC upon manufacturers, distributors, and retailers **are crucial to the attainment of the CPSA's primary goal: the protection of consumers** . . . The CPSC can protect consumers from dangerous consumer products *only if product hazards are brought to its attention.*" *Id.* at 704. (emphasis added)

IV. The same question has been confronted by other federal courts generating additional conflicting decisions. These other conflicting decisions amplify the importance of the question.

A brief chronology of these other federal cases follows:

Butcher v. Robertshaw Controls Co., 550 F. Supp. 692 (D. Md. 1981)

Decided July 31, 1981.

The *Butcher* Court held that:

"*Of paramount importance* to the efficient functioning of the CPSC *is* a subset of these administrative regulations comprising *what might conveniently be referred to as disclosure rules.*" *Butcher* at 695. (emphasis added)

"[I]t is clear that the Commission cannot and does not rely solely on standards or bans; indeed, *without disclosure provisions such as 16 C.F.R. Section 1115, it would be impossible for the Commission to gain an awareness of substantial product hazards* in order to begin thinking about bans or standards **in the first place**." *Id.* at 696. (emphasis added)

In contrast to *Drake, Butcher* specifically adopted the rule of statutory construction enunciated in *Consumer Prod. Safety Comm. v. GTE Sylvania,* 447 U.S. 102, 108 (1980).

"If Congress had wished to limit the cause of action to violations of only such safety rules, it could easily have done so, but the inclusion of the phrase 'or any other rule' belies any such intention." *Butcher* at 699.

Quoting from *United States v. Anaconda Co.,* 445 F. Supp. 486, 494 (D.D.C. 1977), the *Butcher* decision noted:

"Remedial safety legislation such as the Act [CPSA] should be broadly construed to effectuate its purpose. **The court should not create a loophole that might work to the injury of public protection** through a technical construction." (citation omitted) *Id.* at 699. (emphasis added)

Young v. Robertshaw Controls Co., 560 F. Supp. 288 (N.D. N.Y. 1983)

Decided March 7, 1983.

The *Young* court held that noncompliance with the notification requirements in 16 C.F.R. Section 1115 created a private cause of action. The court noted

> "*Defendant's contention* that the violation of a disclosure rule does not entitle plaintiff to maintain a private action . . . *flies in the face of this unambiguous language.*" *Young* at 292. (emphasis added)

Payne v. A. O. Smith Corp., 578 F. Supp. 733 (S.D. Oh. 1983)

Decided November 14, 1983.

Payne adopted the plain language rationale reflected in those cases that have held that a violation of disclosure rules is actionable. *See Payne* at 738

Morris v. Coleco Industries, 587 F. Supp. 8 (E.D. Va. 1984)

Decided March 16, 1984.

This decision arguably adopts the reasoning in *Drake*. However, the *Swenson* decision opined that this very terse decision is distinguishable. *See Swenson* at 700.

Preston v. Honeywell, Inc., No. 83-CV-1036 (N.D. N.Y. September 26, 1984)

Decided September 26, 1984.

Citing *Young v. Robertshaw Controls Co.*, 560 F. Supp. 288 (N.D. N.Y. 1983), the District Court, in an unpublished order, denied Honeywell's motion for dismissal of an action alleging a cause based on violation of disclosure requirements in 16 C.F.R. Section 1115.

Swenson v. Emerson Electric Co., 356 N.W.2d 313 (Minn. App. 1984)

Decided October 2, 1984.

This is the lower court decision which was sustained in *Swenson.* The Court held:

> *"The wording of the statute is plain, simple and straightforward,* and the words must therefore be accorded their normal meaning." 356 N.W.2d at 317. (emphasis added)
>
> "Even if appellants' characterization of the cited regulations is correct, actions alleging violations of the regulations are cognizable under the *plain language* of Section 2072." *Id.* (emphasis added)

Wilson v. Robertshaw Controls Co., 600 F. Supp. 671 (N.D. Ind. 1985)

Decided January 8, 1985.

Wilson is yet another decision in which a federal district court found that a private cause of action does exist for failure to comply with the notification requirements of 16 C.F.R. Section 1115. The Court held:

> "The second category of rules [administrative rules] . . . facilitates the administration of the CPSC and its statutory duties. *Crucial among these is the subset of regulations comprising the disclosures rules. Wilson* at 673, 674. (emphasis added)
>
> 'Defendant's contention that 16 C.F.R. Section 1115, an "interpretive" rule, is not a "rule" within the meaning of the Administrative Procedure Act, 5 U.S.C. Section 551, et seq. . . . is wholly without merit.' *Id.* at 675 (quoting *Young v. Robertshaw Controls,* 560 F. Supp. at 292-93).
>
> . . .
>
> *The language* of the statute at issue *is plain and straightforward and* the words, therefore, *must be accorded their plain meaning."* *Id.* (emphasis added)

Drake v. Lochinvar Water Heater, Inc., 618 F. Supp. 549 (D. Minn. 1985)

Decided March 21, 1985.

This is the federal district court decision which was overruled in *Drake*. In contrast to the Eighth Circuit, the lower court held:

> ". . . Honeywell is fighting an uphill battle, in that Honeywell's analysis fails to account for the plain meaning of the statutory language, the statute's legislative history, or rather, the lack thereof, and the overwhelming weight of contrary judiciary authority." 618 F. Supp. at 551.

The Court further held that Honeywell's contention that the term "other rule" in Section 23(a) refers only to substantive rules is a view that ". . . 'flies in the face' of the unambiguous language of the statute." *Id.*

> "[T]here is no indication whatsoever in the language of section 2072(a) to limit 'other rules' to the species of rules defined by Honeywell. In addition, there is no statutory language revealing an intent to exclude interpretive rules from the scope of Section 2072(a). *Id.*

Kahn v. Sears, Roebuck & Co., 607 F. Supp. 957 (N.D. Ga. 1985)

Decided March 26, 1985.

Reaching the same conclusion as *Drake*, the court stated: "This court holds that Section 2072 was intended to give a cause of action only for the violation of a substantive rule promulgated by the Commission and not to any administrative rule which simply interprets the statute with respect to filing information with the Commission." *Kahn* at 958, 959. (emphasis added)

V. The question presented is of great public importance because it directly impacts public health and safety.

As reflected in the respective opinions in *Swenson* and *Drake,* **both Courts agreed that the question presented was very important to the issue of public safety.** See quotations from *Drake* and *Swenson,* pp. 16, 17 *supra.* The recognition of the importance of this question was well founded.

The CPSA was enacted as a result of a three (3) year study by the National Commission on Product Safety. In June of 1970, this bipartisan commission reported to the President and the Congress the result of its three (3) year study. *See* National Commission on Product Safety, *Final Report* (June 1970).

The Commission noted that the Congress had requested it to respond to a critical question, namely "What is the measure of exposure of American consumers to unreasonable product hazards?" *Id.* at 1. In response to that question, the Commission reported:

> **"Measure of Exposure**
>
> **Americans—20 million of them—are injured each year in the home as a result of incidents connected with consumer products. Of the total, 110,000 are permanently disabled and 30,000 are killed. A significant number could have been spared if more attention had been paid to hazard reduction. The annual cost to the Nation of product-related injuries may exceed $5.5 billion.**
>
> The exposure of consumers to unreasonable consumer product hazards is excessive by any standard of measurement." *Id.*

It is indisputable that the disclosure requirements are critically related to the structure, purpose and efficacy of the CPSA. *See* both *Drake* and *Swenson.* The CPSC so declared in a recent publication entitled "Statement of Enforcement Policy on Substantial Product Hazard Reports." In that publication, the CPSC made the following comments:

> "[T]he Commission believes that there is an extensive amount of underreporting especially of the more significant hazards." Statement of Enforcement Policy on Substantial Product Hazard Reports, 49 Fed. Reg. 13820 (1984) (to be codified at 16 C.F.R. Section 1115).
>
> "The *Section 15 reporting requirements are critical* to the Commission in administering its statutory responsibilities." *Id.* (emphasis added)
>
> **"These reports provide a key basis for evaluating a potential hazard and the need, if any, for corrective action in the form of public notice . . . ."** *Id.*
>
> "The Commission is particularly disturbed by the fact that, *of the 25 most serious hazard files opened* by the Commission . . . *only 5 resulted from Section 15 reports by firms.*" *Id.* at 13821. (emphasis added)

Most interestingly, *the statement* from the CPSC *reflects the Commission's belief* "*. . . that Section 23* of the CPSA *provides a private cause of action* for injuries sustained *because of a* manufacturer's alleged *failure to disclose* Section 15(b) information to the Commission." *Id.* (emphasis added) This statement reflects the Commission's belief that the availability of this private sanction was both intended by the Congress and is critical to the obtainment of its statutory goal.

The question which this Court should address is whether or not the Commission is correct in its belief that the purpose of the CPSA was to be facilitated by the granting of a private cause of action to a consumer injured by a wilful violation of the disclosure rules.

VI. Summarily enforcing statute of limitations where defendant admits to willful and fraudulent withholding of a self-concealing reportable defect creates a cynical disincentive to report substantial product hazards as required by 16 C.F.R. Section 1115.

The Sixth Circuit ruled that Honeywell's admitted willful and fraudulent noncompliance with its affirmative duty to report the dangerous and self-concealing defect did not entitle the Copleys to a hearing on the question of whether or not their failure to timely discover the concealed defect excused the untimely commencement of their common law action.

The Sixth Circuit refused to apply a well-accepted equitable tolling principle as enunciated by the United States Supreme Court. Speaking of the statute of limitations, the United States Supreme Court has stated:

> "They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed . . . **To hold that by . . . committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the Statute of Limitations to protect it, is to make the law which was designed to prevent fraud, the means by which it is made successful and secure.**" *Bailey v. Glover,* 88 U.S. (21 Wall.) 342, 349 (1875)

The Sixth Circuit's error is devastating to the attainment of the public safety goal of the CPSA. It creates a cynical disincentive to comply with a manufacturer's duty to disclose.

The greater the potential for severe injury, the greater will be the incentive to conceal. Self-concealing defects require compliance more so than any other kind of defect. Notwithstanding this necessity, the lower court granted Honeywell and other manufacturers a carrot for willful noncompliance and fraud, namely the potential for summary extinguishment of otherwise serious and meritorious claims. The result is contrary to fundamental principles of equity enunciated by this Court and is inimical to the public safety goals which are the very essence of the CPSA.

Interestingly, the National Commission on Product Safety, in a chapter specifically dealing with the "impact of the common law on consumers", cited statute of limitation defenses, among other things, as giving manufacturers an unfair advantage in product litigation. National Commission on Product Safety, *Final Report* (June 1970) at 73.

CONCLUSION

1. The question presented is critical to the primary goal of the CPSA, namely the reduction of serious injuries by notification to the public of known serious product hazards.

2. The rules of the United States Supreme Court establish criteria for the review of conflicts between lower courts. The Sixth Circuit decision is the second United States Court of Appeals decision on the identical question that falls foursquare within those criteria.

3. The *Drake* decision and the Sixth Circuit's decision are contrary to the "overwhelming weight . . . of judicial authority." 618 F. Supp at 551.

4. Resolution of this important public safety-related question by the Supreme Court of the United States should not seriously burden the Court. The question presented is a straightforward issue of statutory construction involving the meaning of three (3) words, namely "any other rule".

5. The lower court's creation of a disincentive for compliance with 16 C.F.R. Section 1115 is contrary to a fundamental equitable principle, namely that no one will be permitted to gain an advantage or be rewarded by admitted acts of fraud.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed May 20, 1987)

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

No. 86-3360

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM COPLEY; PATSY COPLEY; and DALE COPLEY,
Plaintiffs-Appellants,

v.

HEIL-QUAKER CORPORATION; HONEYWELL, INC.; SEARS, ROEBUCK & COMPANY; PHILLIPS BOTTLED GAS COMPANY; and FREY & SONS,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: MARTIN, JONES, and MILBURN, *Circuit Judges.*

PER CURIAM. This case stems from injuries sustained by William Copley when a gas furnace exploded in his home. Copley, his wife, and son appeal the district court's entry of summary judgment for the defendants based on the Copleys' failure to comply with the statute of limitations. We affirm.

In December 1975 Copley awoke to find his furnace inoperative. He went to the basement where he smelled

liquid propane gas and heard a hissing noise. He manually closed the gas valve and attempted to turn on an electric fan to disburse the gas prior to relighting the pilot light. A spark from the fan ignited the gas and Copley was severely burned.

The furnace was manufactured by Heil-Quaker, a Delaware corporation with its principal place of business in Tennessee. The gas valve was manufactured by Honeywell, Inc., a Delaware corporation with its principal place of business in Minnesota.

The Copleys filed a personal injury action against Heil-Quaker in federal court in Ohio in August 1982. They filed a common law action for negligence and breach of warranty against Honeywell in federal court in Minnesota in September 1982. Also in September they amended their Ohio complaint to assert a statutory claim against Honeywell, alleging violation of the Consumer Product Safety Commission's reporting rules. The Minnesota cause of action was transferred to Ohio and the cases consolidated. The district court granted summary judgment to both defendants based on its determination that the claims were time-barred.

The statute of limitations for personal injury actions in Ohio is two years. Ohio Rev. Code § 2305.10. The statutory period under Minnesota law for the common law claims is six years for negligence and four years for breach of warranty. Minn. Stat. §§ 541.05(5), 336.2-725. Minnesota law determines the applicable period for these claims because of the general federal rule, as applied in this circuit, that when diversity actions are transferred for the convenience of the parties under 28 U.S.C. § 1404(a), the state law of the transferor court should be applied. *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964); *Martin v. Stokes*, 623 F.2d 469, 473 (6th Cir. 1980).

The Copleys filed suit in September 1982, approximately six years and nine months after the December 1975 explosion. They argue that their complaint against Honeywell is timely, however, because the limitations period should be tolled under the doctrine of fraudulent concealment. We find this argument unpersuasive. The doctrine of fraudulent concealment is commonly applied in instances where a defendant by fraud has prevented a plaintiff from learning of his cause of action. *DeCosse v. Armstrong Cork Co.*, 319 N.W.2d 45 (Minn. 1982); *Couillard v. Charles T. Miller Hosp., Inc.*, 253 Minn. 418, 92 N.W.2d 96 (1958). In such cases, the statute of limitations is tolled until the cause of action is discovered or could have been discovered through due dilligence. In the current case plaintiffs knew Copley had been injured at the time of the explosion and knew immediately that the source of his injury was the furnace. Shortly after the accident, a plumber told Patsy Copley that in his opinion the explosion was caused by the Honeywell valve. He retained the valve in the event she later needed it. Thus, even assuming that Honeywell did act fraudulently, its conduct did not prevent the Copleys from uncovering material facts necessary to the commencement of their action.

William Copley also argues that the limitations period should be tolled because of his alleged disability as a result of the explosion. However, under Minnesota law a plaintiff's disability

> existing at the time when a cause of action accrued or arising anytime during the period of limitation, shall suspend the running of the period of limitation until the same is removed; provided that such period, except in the case of infancy, shall not be extended for more than five years, nor in any case for more than one year after the disability ceases . . . .

Minn. Stat. § 541.15. Thus, William Copley, who was allegedly disabled until March 1980, would have had until March 1981 to file his claim. The claim of his son, who reached majority in December 1976, is also time-barred under the statute.

Further, we find the Copleys' statutory complaint seeking damages for violations of the reporting requirements of the Consumer Product Safety Commission, 15 U.S.C. § 2064(b), to be controlled by the reasoning stated in *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986) (failure to comply with the Commission's reporting rules does not give rise to a private cause of action). Accordingly, the claims against Honeywell were properly dismissed by the district court.

With regard to the Copleys' claim against Heil-Quaker, the cause of action for personal injury accrued at the time of the accident. The applicable limitations period is two years. Mrs. Copley's cause of action commenced to run immediately, Mr. Copley's commenced, at the latest, on the cessation of his alleged incapacity in March 1980, and Dale Copley's commenced when he reached majority. Thus, even if each is given the benefit of Ohio's disability statute, Ohio Rev. Code § 2305.16, none was timely when filed in September 1982.

Finally, plaintiffs argue that Heil-Quaker should not be permitted to have the benefit of Ohio's statute of limitations unless and until it obtains a license to do business in Ohio. Because we find the application of Ohio's saving clause, Ohio Rev. Code § 2305.15, to be in violation of the commerce clause of the Constitution, *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, No. 85-3784 (6th Cir. May ...., 1987), we affirm the decision of the district court dismissing as untimely plaintiffs' claim against Heil-Quaker.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed March 25, 1986)

Case No. C 82-512

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILLIAM COPLEY, *et al.*,
Plaintiffs,

vs.

HEIL-QUAKER CORPORATION, *et al.*,
Defendants.

OPINION AND ORDER

POTTER, *J.*:

This matter is before the Court on defendant Honeywell, Inc.'s (hereafter Honeywell) motion for summary judgment, plaintiffs' opposition thereto and plaintiffs' supplemental memoranda, plaintiffs' unopposed motion for leave to reply instanter to the separate answers of Honeywell, third-party defendant Sears, Roebuck & Company's (hereafter Sears) motion to dismiss, Honeywell's opposition thereto, Sears' reply and several addenda to said motion, and the unopposed motion of Sears to stay discovery.

During a pretrial conference held October 3, 1985, the Court granted Sears' unopposed oral motion that the Court withhold ruling on the motions of Sears to stay discovery and to dismiss until such time as the Court

had rendered its decision as to Honeywell's motion for summary judgment. On December 20, 1985, a hearing was held on Honeywell's motion for summary judgment. Said motion and the issues therein raised are before the Court on the depositions, answers to interrogatories and admissions on file, the pleadings, affidavits, and the various memoranda and the oral arguments of the respective parties.

This personal injury action arises out of a gas explosion that occurred on December 12, 1975. Plaintiffs William Copley and Patsy Copley are husband and wife, and are the parents of plaintiff Dale Copley. On August 24, 1982, plaintiffs commenced a personal injury action in this Court against Heil-Quaker Corporation. On September 7, 1982, plaintiffs filed a complaint in the United States District Court for the District of Minnesota, Fourth Division, thereby commencing a personal injury action against Honeywell, alleging, *inter alia*, negligence, breach of express and implied warranties and fraudulent concealment. On September 9, 1982, plaintiffs filed their first amended complaint in this Court by which Honeywell, Inc., *inter alia*, was added as a defendant to the Ohio case, thereby commencing plaintiffs' personal injury action against Honeywell under Section 23 of the Consumer Product Safety Act (hereafter CPSA), 15 U.S.C. §2072.

The Minnesota District Court originally granted Honeywell's motion for dismissal on the grounds that plaintiffs' claims against Honeywell were barred by the applicable statutes of limitations and that "none of the conceivable bases for tolling the statute of limitations suggested by the Complaint would extend the limitation period sufficiently to make plaintiffs' action timely. . . ."

Thereafter, plaintiffs filed a motion for reconsideration in which they argued that the statute of limitations had been tolled as a result of Honeywell's fraudulent concealment of certain relevant facts. Specifically, plaintiff Patsy Copley asserted by affidavit that after the explosion in her home she made an investigation into the safety of the subject gas control valve, but dropped the matter after being led to believe the control valve was safe. The Minnesota court vacated its dismissal of plaintiffs' case against Honeywell on the ground that plaintiffs' action against Honeywell should not be dismissed at the pleading stage and plaintiffs should have an opportunity to further develop their case against Honeywell. The Minnesota District Court subsequently transferred the case to this Court pursuant to 28 U.S.C. §1404(a).

By its order of March 6, 1984, this Court, *inter alia*, consolidated the transferred Minnesota case with plaintiffs' CPSA action in this Court, determined both that the statute of limitations governing plaintiffs' claims is set forth in Ohio Rev. Code §2305.10 and that any tolling provision set forth in OHIO REV. CODE §2305.16 is inapplicable to the case *sub judice*, and denied Honeywell's motion for judgment on the pleadings or, in the alternative, for summary judgment, finding, as did the Minnesota court, that it would be inappropriate at the pleading stage to grant such a motion because a genuine issue of fact then existed with respect to the fraudulent concealment issue.

Plaintiffs' complaint, as amended, alleges that in late 1967, plaintiffs William and Patsy Copley purchased a gas furnace incorporating a defective gas control valve manufactured by Honeywell. Plaintiffs further allege that on December 12, 1975 a gas explosion occurred in

the Copley home as a result of the failure of the Honeywell gas control value to shut off the flow of liquid propane gas upon pilot light outage. Plaintiffs claim that as a result of the December 12, 1975 gas explosion they suffered "catastrophic injuries" which were proximately caused by the defective Honeywell gas control valve.

Honeywell moves this Court, pursuant to Fed.R.Civ.P. 56(b) and (c), for summary judgment against plaintiffs on the ground that there is no genuine issue as to any material fact and that Honeywell is entitled to judgment as a matter of law. Specifically, Honeywell contends that it is entitled to summary judgment on the ground that "each plaintiff's . . . cause of action against Honeywell is barred by applicable statutes of limitation." Honeywell maintains that since the Minnesota action and the Ohio action were commenced against Honeywell on September 8, 1982 and September 9, 1982 respectively, that is, approximately six years and nine months after the December 12, 1975 explosion, on the face of the respective complaints, both lawsuits were barred respectively by Minnesota's four-year and six-year statutes of limitations and Ohio's two-year statute of limitations for personal injury actions.

For purposes of Honeywell's motion for summary judgment, Honeywell concedes *arguendo* that "it engaged in acts of concealment as alleged by plaintiffs." Notwithstanding, Honeywell contends that any such concealment by it in no way affected plaintiffs' knowledge either of their injuries or of the connection of the Honeywell gas control valve to plaintiffs' injuries, that is, that the gas explosion causing plaintiffs' injuries was caused by the allegedly defective Honeywell gas control valve. Specifically, Honeywell contends that because William Copey's physical injuries were immediately apparent and because plaintiffs were informed within six months of the

date of the explosion that the gas control valve both was manufactured by Honeywell and had caused the explosion, plaintiffs had sufficient knowledge to bring an action against Honeywell within the applicable statute of limitations periods.

Honeywell maintains that although plaintiffs were informed early on that the Honeywell valve had leaked, thereby failing to shut off the gas, plaintiffs did not diligently inspect the valve or cause any further investigation regarding the valve or the accident to be undertaken until the Spring of 1982. Honeywell asserts that plaintiffs never contacted Honeywell directly after learning that the Honeywell gas control valve had leaked. Honeywell further asserts that it never denied manufacturing the subject gas control valve nor made any representations to plaintiffs to lead them to believe that the Honeywell valve had not caused the December 12, 1975 gas explosion. In sum, Honeywell contends that plaintiffs injuries were patent and, therefore, plaintiffs knew of their injuries, that within six months of the accident it was determined that the Honeywell gas control valve was the cause of the explosion, and that the subject valve was available for further inspection and testing. Notwithstanding, plaintiffs failed to commence both the Ohio and Minnesota actions against Honeywell until after the applicable statute of limitations periods had expired. Finally, Honeywell maintains, in essence, that given the state of plaintiffs' knowledge of the facts relevant to their causes of action, plaintiffs' causes of action against Honeywell accrued no later than six months after the December 12, 1975 accident and are, therefore, barred by the applicable statutes of limitations, none of which are tolled or extended in this case by Minnesota's fraudulent concealment doctrine or Ohio's discovery rule since neither of the foregoing applies to

cases of non-latent personal injuries where the connection between plaintiffs' injuries and the cause thereof is apparent.

In their opposition to Honeywell's motion for summary judgment, plaintiffs appear not to contest defendant's assertion that from the face of plaintiffs' complaint, it is clear that the statute of limitations period applicable to each of plaintiffs' causes of action whether under the CPSA or under either Ohio or Minnesota law, elapsed prior to commencement of plaintiffs' actions against Honeywell. Notwithstanding, plaintiffs maintain, in essence, that Honeywell's fraudulent concealment of the very design defect both of the Honeywell gas control valve which caused the December 12, 1975 explosion and of the entire Honeywell V8280 family of such valves, either tolls the running of the applicable statutes of limitations or estops Honeywell from asserting the statute of limitations defense with respect both to plaintiffs' common law products liability claims and their claim for relief under the CPSA.

Specifically, plaintiffs contend that Honeywell engaged in a continuous course of conduct which was calculated to conceal the very design defect of the Honeywell gas control valve which plaintiffs claim caused the December 12, 1975 explosion. Plaintiffs further contend that the subject design defect—the "stick-down" problem—of the V8280 family of Honeywell gas control valves was discovered by Honeywell at least nine years before the gas explosion which is the subject of this lawsuit. Plaintiffs claim that, notwithstanding the foregoing and the fact that the "stick-down" problem may not be discoverable before or after an explosion other than by someone who is already cognizant of said design defect, Honeywell failed to comply with the disclosure requirements of the CPSA. Plaintiffs assert that they have, in fact, acted diligently

regarding their efforts to ascertain the specific cause of the gas explosion. Moreover, plaintiffs maintain that their ignorance of the gas control valve design defect resulted from Honeywell's fraudulent concealment of the "stick-down" problem, rather than from their lack of diligence, and therefore, there is no reason why plaintiffs' ignorance should not prevent the running of a statute of limitations in favor of the wrongdoer, Honeywell.

Plaintiffs assert that since they have a private cause of action under the CPSA, 15 U.S.C. §2072(a), the issue *sub judice* is when did the statute of limitations with respect to said cause of action commence to run. Plaintiffs argue, in essence, reason dictates that their cause of action under 15 U.S.C. §2072(a) for Honeywell's failure to disclose information cannot be summarily dismissed due to plaintiffs' failure to timely commence their action as a result of being without the very information which Honeywell was required by the CPSA to disclose. Plaintiffs further argue that their common law claims are likewise preserved.

Honeywell has moved, pursuant to Fed.R.Civ.P. 56(b), for summary judgment. Fed.R.Civ.P. 56(c), in pertinent part, provides that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(e), in pertinent part, provides that "[w]hen a motion for summary judgment is made and supported . . ., an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or . . . otherwise . . ., must set forth specific facts showing that there is a genuine issue for trial. If he does not so re-

spond, summary judgment, if appropriate, shall be entered against him."

Summary judgment is appropriate and may be granted only where there is no genuine issue with respect to the material facts of the case. *Mozert v. Hawkins County Public Schools,* 765 F.2d 75, 78 (6th Cir. 1985), *citing, County of Oakland v. City of Berkley,* 742 F.2d 289, 297 (6th Cir. 1984); *In re Atlas Concrete Pipe, Inc.,* 668 F.2d 905, 908 (6th Cir. 1985). A court may not properly resolve disputed questions of fact in a summary judgment decision, and if a disputed question of material fact exists, the court should deny the motion for summary judgment and proceed to trial. See *In re Atlas Concrete Pipe, Inc.,* 668 F.2d at 908. Indeed, the very purpose of a motion for summary judgment is to eliminate a trial where it would be unnecessary and merely result in delay and expense. *Bouldis v. U.S. Suzuki Motor Corp.,* 711 F.2d 1319, 1324 (6th Cir. 1983). Although summary judgment is a useful and often efficient device for deciding appropriate cases, it must be employed only with extreme caution for it operates to deny a litigant his day in court. *Smith v. Hudson,* 600 F.2d 60, 63 (6th Cir. 1979), *cert. dismissed,* 444 U.S. 986 (1979). If the record evidence plainly reveals that no dispute as to any material fact exists, the case should be decided as a matter of law rather than be submitted to a jury. *Bouldis,* 711 F.2d at 1324, *citing, Davis-Watkins Co. v. Service Merchandise,* 686 F.2d 1190, 1197 (6th Cir. 1982), *cert. denied sub nom. Service Merchandise Co. v. Amana Refrigeration, Inc.,* 466 U.S. 931 (1984). See also *Smith v. Hudson,* 600 F.2d at 64-65.

The United States Court of Appeals for the Sixth Circuit has interpreted Fed.R.Civ.P. 56(c) to require that "the District Court . . . review the entire record before deciding whether to render a decision on the merits."

Smith v. Hudson, 600 F.2d at 64. Moreover, a party is never required to respond to a motion for summary judgment in order to prevail thereon since the burden of establishing the nonexistence of genuinely disputed material fact always rests with the movant. *Smith v. Hudson, supra, citing, Adickes v. Kress & Co.,* 398 U.S. 144, 160 (1970) (other citations omitted).

In ruling on a motion for summary judgment, the Court's function is to determine with respect to any fact which is material to the issues *sub judice,* if any genuine issue exists, not to resolve disputed factual issues, and to deny summary judgment if such an issue does exist. *United States v. Diebold, Inc.,* 369 U.S. 654 (1962); *Tee-Pak, Inc. v. St. Regis Paper Co.,* 491 F.2d 1193 (6th Cir. 1974). Further, "[i]n ruling on a motion for summary judgment, the Court must construe the evidence in its most favorable light for the party opposing the motion and against the movant." *Bohn Aluminum & Brass Corp. v. Storm King Corp.,* 303 F.2d 425, 427 (6th Cir. 1962). See also *Brown v. Johnstone,* 5 Ohio App.3d 165, 167 (Summit County Ct. App. 1982). If reasonable minds could differ as to a material fact in issue, then a genuine factual dispute exists and the motion for summary judgment must be denied.

Having thoroughly reviewed the entire record in this case—"the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits"—including the declarations of plaintiffs contained in their response to Honeywell's motion for summary judgment and viewing said pleadings, affidavits and the other materials on file in this case in a light most favorable to plaintiffs, the Court finds that there is no genuine issue as to any material fact which makes the granting

of summary judgment inappropriate. The Court further finds that no genuine issue exists with respect to any fact which is material to the issues *sub judice.*

Upon consideration, the Court finds that the following facts which are material to the issues *sub judice* are undisputed and, therefore, that no genuine issue exists with respect to said facts. The gas explosion which is both the source of plaintiffs' injuries and the subject of this lawsuit occurred on December 12, 1975. (William Copley deposition, p. 8; Patricia Copley deposition, p. 6). As soon as the explosion occurred, William Copley's injuries were immediately apparent. (P. Copley deposition, p. 8; W. Copley deposition, pp. 120, 184; second amended complaint, ¶13). William Bloom, a plumbing and heating installer (William Bloom deposition, p. 24), investigated the accident and inspected plaintiffs' furnace on December 12, 1975 (W. Bloom deposition, p. 36), at which time Bloom removed the Honeywell gas control valve. (W. Bloom deposition, pp. 34, 36). Bloom determined both that the Honeywell gas control valve was faulty in that it had allowed gas to leak and that said valve had caused the explosion. (W. Bloom deposition, pp. 34-35, 79, 91, 94, 118; P. Copley deposition, pp. 23-24). Within six months of the date of the gas explosion, Bloom informed Patricia Copley that the valve had leaked and that the faulty valve had caused the explosion. (W. Bloom deposition, pp. 94-95, 99, 133; P. Copley deposition, pp. 23-24). Patricia Copley communicated Bloom's opinion that the Honeywell gas control valve had leaked and had caused the explosion, to William Copley. (W. Copley deposition, pp. 177-178).

The Court finds that it is undisputed that at the time of the accident plaintiffs knew of their injuries and

that within six months of the date of the explosion, to wit, June of 1976, plaintiffs knew that a gas control valve manufactured by Honeywell had caused the explosion by allowing gas to leak upon pilot light outage. The Court further finds that the only remaining question is whether or not defendant is entitled to judgment as a matter of law. A limitation of action issue can be resolved as a matter of law if the undisputed facts establish the time when a plaintiff's cause of action accrued. *American Hotel Management Associates, Inc. v. Jones*, 768 F.2d 562, 568 (4th Cir. 1985).

A civil action such as the case *sub judice* is commenced by the filing of a complaint with the Court. Fed.R.Civ.P. 3. A civil action, unless a different limitation is prescribed by statute, can be commenced in Ohio only within the period prescribed in Ohio Rev. Code §§2305.03 to 2305.22. See OHIO REV. CODE §2305.03. Cf. 34 O.Jur.2d, *Limitation of Actions* §17 (2d ed. 1958).

Section 2072 of Title 15 of the United States Code, by its express terms, provides plaintiffs in this case with a private right of action.[1] See, e.g., *Wilson v. Robertshaw Controls Co.*, 600 F. Supp. 671, 675 (N.D. Ind. 1985); *Payne v. A. O. Smith Corp.*, 578 F. Supp. 733, 736 (S.D. Ohio 1983); *Swenson v. Emerson Electric Co.*, 374 N.W.2d 690, 699 (Minn. Sup. Ct. 1985). Neither 15 U.S.C. §2072, nor any other provision of the CPSA nor the legislative history of the CPSA, see 1972 U.S. CODE CONG. & AD. NEWS

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1. Section 2072(a) of Title 15 of the United States Code, in pertinent part, provides:

> Any person who shall sustain injury by reason of any knowing . . . violation of a consumer product safety rule, or any other rule or order issued by the [Consumer Products Safety] Commission may sue any person who knowingly . . . violated any such rule or order in any district court of the United States in the district in which the defendant resides or is found or has an agent. . . .

4573 *et seq.*, discusses a statute of limitations to be applied to a private action brought under 15 U.S.C. §2072(a). In such cases where an express Congressional directive is absent as is often the case in federal civil law, the United States Supreme Court has instructed that courts apply the most closely analogous statute of limitations under state law. See *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983). Cf. *IDS Progressive Fund, Inc. v. First of Michigan Corp.*, 533 F.2d 340, 342 (6th Cir. 1976); 2 J. Moore, J. Lucas, H. Fink & C. Thompson, MOORE'S FEDERAL PRACTICE ¶ 3.07[2] (2d ed. 1985).

The Court is of the opinion that plaintiffs' action brought under 15 U.S.C. §2072(a) clearly is in the nature of a personal injury action based on defendant's alleged failure to comply with the reporting and disclosure requirements of the CPSA and the rules promulgated thereunder. Accordingly, as this Court held in its March 6, 1984 memorandum and order, the statute of limitations applicable to plaintiffs' claim under the CPSA, 15 U.S.C. §2072, is stated at OHIO REV. CODE §2305.10,[2] which, in pertinent part, provides:

> An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

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2. But see *Payne v. A. O. Smith Corp.*, 578 F. Supp. 733 (S.D. Ohio 1983), wherein the court held that the differences between the CPSA and a "garden variety" tort action are sufficient to disclaim the applicability of OHIO REV. CODE §2305.10 to actions under the CPSA. After determining that the analogous Ohio limitations period would appear to be either OHIO REV. CODE §2305.09 (four years for fraud or for torts not enumerated elsewhere) or OHIO REV. CODE §2305.07 (six years for liability created by statute), the *Payne* court opted to apply §2305.09 to the CPSA case *sub judice*, finding "that a CPSA action does partake of elements of a typical tort, even if it is not identical to same." *Payne*, 578 F. Supp. at 737.

OHIO REV. CODE §2305.10 governs all actions the real purpose of which is to recover damages for injury to the person and losses incident thereto. 34 O.Jur.2d, *Limitation of Actions* §51 (2d ed. 1958 & Supp. 1985). See also *id*, at §17. The limitation is imposed on the cause of action, and the form in which the action is brought is immaterial. *Id.*

Plaintiffs' common law personal injury claims based on negligence and breach of express and implied warranties would, under Ohio law, be similarly subject to the strictures of OHIO REV. CODE §2305.10. See, e.g., *Clutter v. Johns-Manville Sales Corp.*, 646 F.2d 1151, 1157 (6th Cir. 1981), *citing, Mahalsky v. Salem Tool Co.*, 461 F.2d 581 (6th Cir. 1972). Cf. *Lee v. Wright Tool & Forge Co.*, 48 Ohio App.2d 148 (Summit County Ct. App. 1975); 34 O.Jur.2d, *supra*, at §§17, 51. Under Minnesota law, plaintiffs' breach of warranty claims in this personal injury action would be subject to a limitation period of four years pursuant to MINN. STAT. §336.2-725(1),[3] *Mader v. American Motors Corp.*, 611 F. Supp. 877, 879 (D.C. Minn. 1985), and plaintiffs' negligence claim would be subject to the six year limitations period imposed by MINN. STAT. §541.05 (5),[4] *Mader v. American Motors Corp., supra; Karjala v.*

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3. MINN. STAT. §336.2-725, in pertinent part, provides:

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued . . . . (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach . . . . [W]here a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered . . . . (4) This section does not alter the law or tolling of the statute of limitations. . . .

4. MINN. STAT. §541.05, in pertinent part, provides:

Subdivision 1. Except where the uniform commercial code otherwise prescribes, the following actions shall be com-

(Continued on following page)

Johns-Manville Products Corp., 523 F.2d 155, 160 (8th Cir. 1975).

A statute of limitations is a product of legislation, but it is the judiciary's task to interpret and enforce such an enactment. *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 665 (3d Cir. 1980) (applying Ohio law), *cert. denied*, 449 U.S. 976 (1980). In other words, "[a]bsent legislative definition, it is left to the judiciary to determine when a cause 'arose.'" *O'Stricker v. Jim Walter Corp.*, 4 Ohio St.3d 84, 87 (1983), *citing*, *Harig v. Johns-Manville Products Corp.*, 284 Md. 70, 75, 394 A.2d 299, 302 (1978).

The judiciary of Ohio has developed a "discovery rule" with respect to the accrual of a cause of action regarding a latent injury. Most jurisdictions employing a "discovery rule" have held that such a rule does not require that a plaintiff have actual knowledge of the liability of a manufacturer of an allegedly defective product before the limitations period commences to run, only that a plaintiff reasonably should know that an injury was wrongfully caused. See, e.g., *Curry v. A. H. Robbins Co.*, 775 F.2d 212, 216 (7th Cir. 1985). Cf. *Drake v. B. F. Goodrich Co.*, No. 84-5665, slip op. (6th Cir. February 5, 1986).

The Ohio discovery rule provides that "[w]hen an injury does not manifest itself immediately, the cause of action does not arise until the plaintiff knows or, by the exercise of reasonable diligence should have known, that he had been injured by the conduct of defendant. . . ." *O'Stricker*, 4 Ohio St.3d at 90. The discovery rule as

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Footnote continued—

menced within six years: (1) Upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed; . . . (5) . . . [F]or any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated. . . .

articulated by the Ohio Supreme Court in *O'Stricker*[5] is a two-pronged rule requiring that before the statute of limitations begins to run, "a plaintiff must know or reasonably should have known that he has been injured; and . . . a plaintiff must know or reasonably should have known that his injury was proximately caused by conduct of the defendant." *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12 (Erie County Ct. App. 1983). Cf. *Drake v. B. F. Goodrich Co., supra.* As the Ohio Supreme Court instructed, the discovery rule is a two-part rule requiring discovery both of a plaintiff's injury and of the cause thereof. *O'Stricker,* 4 Ohio St.3d at 90.

With respect to commencement of the running of applicable limitations periods, the relevant inquiry before this Court is not when did the plaintiffs actually learn that they had a cause of action against Honeywell, but rather when would a reasonable person have realized that the injuries suffered by plaintiffs might have been the result of wrongful or actionable conduct. See, e.g., *Curry,* 775 F.2d at 216. Having found that it is undisputed that plaintiffs knew of their injuries immediately after the subject explosion and that within six months of the date of said explosion plaintiffs discovered or were informed that the Honeywell gas control valve had caused the explosion, the Court holds that under the law of Ohio, plaintiffs' causes of action accrued and the statute of limitations with respect thereto as stated in OHIO REV. CODE §2305.10 commenced to run no later than six months after the December 12, 1975 gas explosion. *Id.* Cf. *Harper v. Eli Lilly and Co.*, 575 F. Supp. 1359, 1363 (N.D. Ohio 1983).

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5. The *O'Stricker* court stated, "we are instructed by the General Assembly which in its 1980 amendment adopted a 'discovery rule' defining a cause [of action] to arise at discovery of the injury and discovery of the cause thereof." *O'Stricker,* 4 Ohio St.3d at 90.

Upon consideration and in light of the nature of the December 12, 1975 gas explosion, of the nature and extent of William Copley's injuries, and of the acknowledged cognizance, within six months of the date of said explosion, by plaintiffs and by their investigator, William Bloom, of the fact that the Honeywell gas control valve failed to function properly, thereby allowing an accumulation of liquid propane gas which exploded upon activation by William Copley of the blower motor switch, the Court is of the opinion that it is inconceivable that a reasonable person would not have realized within the aforesaid six month period that the explosion was the source of plaintiffs' injuries and that the explosion was caused by the Honeywell gas control valve and, therefore, that plaintiffs' injuries might have been the result of actionable conduct on the part of Honeywell. See *Curry*, 775 F.2d at 216.

The doctrine of equitable estoppel is based upon the principle "that no man may take advantage of his own wrong." *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232 (1959). See generally *McIntosh v. Micheli Restaurant, Inc.*, 22 Ohio Misc.2d 5 (Akron Mun. Ct. 1984). The Sixth Circuit has stated that "[i]f the defendant made a misrepresentation of material fact for the purpose of inducing a plaintiff to delay suit or release him from liability, . . . [plaintiff] is estopped to plead the statute of limitations or to interpose the release as a bar to suit, provided the plaintiff has acted in justifiable reliance upon the misrepresentation." *Ott v. Midland-Ross Corp.*, 600 F.2d 24, 31 (6th Cir. 1979). Estoppel is based upon the theory that where one, by his conduct, has induced another to change his position to his damage, disadvantage, or detriment, he is estopped from benefitting by such conduct. 42 O.Jur.3d, *Estoppel and Waiver* §31

(1983). In other words, a party must endure the consequences of his own acts which mislead another to act to their injury. *Id.* Estoppel must be certain and should not be based upon argument or inference or applied or extended by implication or intendment. A positive assertion of fact is generally necessary to create an equitable estoppel. 42 O.Jur.3d, *supra*, at §41. For the doctrine of equitable estoppel to apply, there must be a representation by words, acts, or silence of past or present fact, not opinion, which both communicates the fact or state of affairs in a misleading way and induces actual reliance in good faith and reasonable under the circumstances, causing the relying party to suffer prejudice or pecuniary disadvantage, if the party whose representation was relied upon were not estopped or precluded from asserting an otherwise valid right. *First Federal Savings & Loan Association of Toledo v. Perry's Landing, Inc.*, 11 Ohio App.3d 135, 145 (Wood County Ct. App. 1983). Cf. 34 O.Jur.2d, *supra*, §182 (2d ed. 1958). Moreover, a party asserting estoppel must be able to show that he had no knowledge or means of knowing the truth. Thus, as a general rule, it is essential to the application of the principles of equitable estoppel that the person claiming to have been detrimentally influenced by either the conduct or the declaration of another, "should have been destitute of knowledge of the facts. . . . Hence, there can be no estoppel where the party claiming it is chargeable with knowledge of the facts. . . ." 42 O. Jur.3d, *supra*, at §66.

To invoke the doctrine of equitable estoppel, it is necessary that a plaintiff reasonably rely on a defendant's conduct or representations in forbearing suit. *Curry*, 775 F.2d at 219, *quoting, Bomba v. W. L. Belvidere, Inc.*, 579 F.2d 1067, 1071 (7th Cir. 1978). As previously noted by this Court, plaintiffs could not reasonably have been mis-

led by Honeywell's fraudulent concealment, as alleged by plaintiffs, once they became aware of the relationship between the December 12, 1975 explosion, their injuries, and the Honeywell gas control valve. *Curry,* 775 F.2d at 219. Cf. *Allen v. A. H. Robbins Co.,* 752 F.2d 1365, 1374 n.6 (9th Cir. 1985). Knowledge of the precise nature of the valve's malfunction or defect is unimportant with respect to the Court's inquiry. That plaintiffs knew that they had been injured and that the Honeywell gas control valve may have been responsible for their injuries, the Court finds to be undisputed and dispositive. (W. Copley deposition, pp. 120, 184, 187; P. Copley deposition, pp. 8, 23-24; W. Bloom deposition, pp. 34-35, 79, 91, 94-95, 118).

The rule in the majority of jurisdictions is that a fraudulent concealment of a cause of action from the one in whom it resides, by the one against whom it lies, postpones the commencement of the running of the statute of limitations until discovery of the fact by the owner of the cause of action. 34 O.Jur.2d, *supra,* at §93. It is well established that the equitable tolling doctrine "is read into every federal statute of limitation." *Ott v. Midland-Ross Corp.,* 600 F.2d at 30, *quoting, Holmberg v. Armbrecht,* 327 U.S. 392, 397 (1946).

The Supreme Court of Minnesota has stated that the doctrine of fraudulent concealment is commonly applied in situations involving either the active or affirmative concealment of a defect or disadvantage, or the false denial of knowledge or information by one who is in possession of the facts, if the effect of such denial is to lead a plaintiff to believe that the facts do not exist or cannot be discovered. *DeCosse v. Armstrong Cork Co.,* 319 N.W.2d 45, 51 (Minn. Sup. Ct. 1982), *citing,* RESTATEMENT (SECOND) OF TORTS §550 comment b (1976). Under Minnesota law,

fraudulent concealment by a defendant may toll a statute of limitations period for two reasons:

> First, one who cannot assert his right because the necessary knowledge is improperly kept from him is not within the mischief the statute [of limitations] was intended to remedy. . . . Secondly, a person should not be permitted to shield himself behind the statute of limitations where his own fraud has placed him.

DeCosse, 319 N.W.2d at 50, *quoting*, *Schmucking v. Mayo*, 183 Minn. 37, 40-41, 235 N.W. 633, 634 (1931).

Plaintiffs allege, in essence, that Honeywell intentionally concealed from those in the vertical chain of distribution, users, and customers, known problems with its family of V8280 gas control valves, that by continuing to manufacture, sell, and distribute V8280 gas valves, Honeywell led those who were subsequently injured as a result of explosions caused by V8280 gas valves to believe said family of valves had no known defects, that Honeywell concealed known defects of its V8280 gas valve from the public through intentional "misstatements, misrepresentations and understatements," and that Honeywell intentionally failed to either inform or notify users of V8280 valves, of known defects thereof. In summary, plaintiffs allege, in essence, that Honeywell affirmatively engaged in an active effort at concealment and that absent such fraudulent concealment by Honeywell, plaintiffs would have commenced their actions against Honeywell within the applicable statute of limitations period because plaintiffs would have learned earlier than 1982 that the Honeywell V8280 family of gas control valves was defectively designed in that "the gas cock dial . . . [could] stick down in the 'on' position," thus allowing unburnt gas, upon pilot light outage, to continue to flow.

Fraudulent concealment must consist of affirmative acts or representations which are calculated to, and in fact do, prevent the discovery of the cause of action. Mere silence of the defendant and failure by the plaintiff to learn of the right of action, alone, are not sufficient. *Curry v. A. H. Robbins,* 775 F.2d at 218, *quoting, Zagar v. Health and Hospitals Governing Commission of Cook County,* 404 N.E.2d 496, 500 (1st Dist. Ct. App. Ill. 1980). Mere silence of the defendant and failure by plaintiff to learn of the precise cause are, alone, not sufficient to constitute fraudulent concealment which tolls the running of a statute of limitations. *Id.*

Minnesota courts have held that a defendant's fraudulent concealment tolls the statute of limitations because the "necessary knowledge" to assert a right of action has been withheld or concealed. *DeCosse,* 319 N.W.2d at 50-51; *Schmucking,* 235 N.W. at 633-34. Generally, the doctrine of fraudulent concealment is applicable primarily to cases where the facts surrounding the cause of a plaintiff's injury are susceptible of being concealed from a putative plaintiff. The cause *sub judice* is not such a case.

Notwithstanding Honeywell's fraudulent concealment of certain material facts regarding the V8280 family of gas control valves (admitted *arguendo* herein), the Court finds that the undisputed facts in this case establish that within the six-month time period immediately following the December 12, 1975 explosion, plaintiffs knew that they had been injured and they knew that the gas control valve manufactured by Honeywell had caused the explosion. In other words, the Court holds that the undisputed facts demonstrate that Honeywell's fraudulent concealment, admitted by Honeywell *arguendo* as alleged by plaintiffs, in no way prevented plaintiffs from recognizing that they were injured or from connecting their injuries to the

Honeywell gas control valve. Merely intoning the words "fraudulent concealment" is not sufficient by itself to avoid the statutes of limitations. *Independent Oil and Tire Co. v. Marathon Petroleum Co.*, 555 F. Supp. 633, 639 (N.D. Ohio 1982), *quoting, Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976).

It is the general rule that a statute of limitations commences to run at the time the cause of action accrues. See Annot., 32 A.L.R.4th 260, 266 (1984); 34 O.Jur.2d, *supra*, at §§56, 81. Accordingly, the Court holds that plaintiffs' causes of action and claims against Honeywell arising out of the December 12, 1975 explosion, accrued no later than six months immediately following said explosion.

The undisputed facts demonstrate that within six months of the date of the explosion plaintiffs were informed that the Honeywell gas control valve had failed to shut off the flow of liquid propane gas into plaintiffs' home upon outage of their furnace pilot light. That plaintiffs were not then also cognizant either of the exact mechanics of the valve malfunction or of any one design defect of the subject gas valve or family of such valves, the Court holds, given the specific undisputed facts of this case, to be insufficient to toll the running of applicable statutes of limitations. It is clear that mere ignorance of their rights on the part of plaintiffs is not sufficient to overcome the limitations defense. *Dayco Corp. v. Firestone Tire & Rubber Co.*, 386 F. Supp. 546, 549 (N.D. Ohio 1974), *aff'd*, 523 F.2d 389 (6th Cir. 1975), and *citing, Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230, 234 (6th Cir. 1974). See also *Ashland Oil Co. of California v. Union Oil Co. of California*, 567 F.2d 984, 988 (Temp. Emer. Ct. App. 1977), *cert. denied*, 435

U.S. 994 (1978), and *citing, Wood v. Carpenter,* 101 U.S. 135, 143 (1879).

Plaintiffs actions against Honeywell were commenced on September 7 and 9, 1982, respectively, that is, approximately six years and nine months after the December 12, 1975 explosion. Therefore, with respect to the statute of limitations issue, whether the Court applies Ohio law or Minnesota law to plaintiffs' instant action against Honeywell, it is clear that plaintiffs commenced their actions against Honeywell subsequent to the time that any applicable statute of limitations period had already elapsed. The Court holds that defendant Honeywell is not estopped to assert its statute of limitations defense. Therefore, the Court concludes that plaintiffs' causes of action against Honeywell arising out of the December 12, 1975 gas explosion and which are the subject of this lawsuit were time-barred by applicable statutes of limitations no later than June, 1982. Accordingly, plaintiffs' actions against Honeywell were not timely commenced, and given the state of plaintiffs' knowledge, neither Ohio's discovery rule nor Minnesota's doctrine of fraudulent concealment nor the doctrine of equitable tolling tolls the running of the statutes of limitations applicable to plaintiffs' causes of action against Honeywell.

Upon a review of Honeywell's action against third-party defendants Sears, Phillip's Bottled Gas Co. and Frey & Sons, the Court finds that Honeywell's third-party action seeks indemnification by or contribution from the aforesaid third-party defendants, in the event Honeywell is held liable to plaintiffs. Therefore, upon consideration and having found, in essence, that Honeywell is not liable to plaintiffs, the Court will dismiss Honeywell's third-party action as being moot.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that plaintiffs' motion for leave to file instanter a reply to separate answers of Honeywell be, and it hereby is, GRANTED; and it is

FURTHER ORDERED that defendant Honeywell's motion for summary judgment be, and it hereby is, GRANTED; and it is

FURTHER ORDERED that defendant Honeywell's third-party complaint against Sears, Phillip's Bottled Gas Co. and Frey & Sons be, and it hereby is, DISMISSED; and it is

FURTHER ORDERED that the motions of defendant Sears to stay discovery and to dismiss be, and the same hereby are, DENIED as moot; and it is

FURTHER ORDERED that plaintiffs' complaint be, and it hereby is, DISMISSED with prejudice.

/s/ JOHN W. POTTER
United States District Judge